Supreme Court, U. S.
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No. 80-1061

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN WATERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the lower evidentiary standard adopted by the Second Circuit in determining the admissibility of coconspirator hearsay declarations, *viz.* whether defendant's conspiratorial involvement has been proven by a "fair preponderance" of the independent nonhearsay evidence, is the proper test to be applied in light of the more stringent evidentiary standard applied by the First, Fifth, Eighth, Ninth and Tenth Circuits, *viz.* coconspirator hearsay declarations are admissible only if the independent nonhearsay evidence, standing alone, would support a jury finding of defendant's involvement in the conspiracy.

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JOHN WATERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John Waters respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Kaufman, Kearse and Bright, JJ.) (Appendix, *infra*) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1980 (Appendix, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions and Rules Involved

Constitutional Provision:

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule:

Rule 801(d) (2) (E) of the Federal Rules of Evidence:

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Statement of the Case

Petitioner was convicted after a jury trial before the United States District Court for the Southern District of New York (Gagliardi, J.) of conspiracy to possess and distribute narcotics and possession with intent to distribute narcotics, in violation of 21 U.S.C. §§ 841 and 846. Petitioner was sentenced to a term of eight years' imprisonment, to be followed by a special parole term of ten years on the substantive count. The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

Indictment 80 Cr. 72, filed in the Southern District of New York on February 7, 1980, charged five individuals, among them John Waters, with conspiracy to violate the federal narcotics laws and with various individual substantive narcotics offenses. Count One charged all five defendants with conspiracy to distribute during the period beginning May 1, 1979 up to and including February 7, 1980. Count Four charged defendant Waters with possession of heroin with intent to distribute it on January 11, 1980.

While Waters is named generally in the preamble to Count One as one of the alleged members of the overall conspiracy, the only overt act in which he is named is Paragraph 11, in which he is alleged to have met with the other defendants to sell one-eighth kilogram of heroin on one occasion (January 11, 1980). Similarly, in Count Four, the only substantive count in which he is named, Waters is charged with possession of heroin involving the one transaction on January 11, 1980. Waters was not charged with involvement in any other narcotics related transactions except the single incident occurring on January 11, 1980.

The investigation which culminated in the instant indictment commenced in May 1979 when George Williams, a Special Agent of the Drug Enforcement Administration acting in his undercover capacity, met with codefendants Archie Phillips and Natalie Rice for the ostensible purpose of arranging introductions for Williams to people in the drug business to whom he could sell quinine and mannite (pharmacologic cutting agents for narcotics). Agent Williams had previously worked with Phillips, with Williams providing the "cut" and Phillips supplying the introductions to narcotics sellers.

Phillips, a low level street dealer, provided Williams an introduction to Natalie Rice and the three met early in May 1979 to discuss the possibility of Williams arranging

the sale of large quantities of quinine. At these conversations, Rice and Phillips are purported to have said that "the man at the Garage" was someone who had been interested in purchasing quinine. Phillips later referred to the "man at the Garage" as "Sugar."

In subsequent discussions over the first half of May 1979, Special Agent Williams attempted to negotiate with Rice and Phillips the sale of large quantities of quinine and mannite as well as the purchase of heroin. Throughout these various negotiations, Rice and Phillips referred to "the man at the Garage" and "Sugar" as a large scale dealer in heroin who would be wanting the quinine and mannite. However, they wouldn't identify him or allow Agent Williams to deal with him directly. Ultimately, however, these negotiations came to naught and no narcotics transactions were ever consummated in May 1979. Nothing more was seen or heard about "the man in the Garage" or "Sugar."

In early January 1980, after a hiatus of nearly six months, Agent Williams accidentally ran across codefendant George Brantley, whom he had earlier met before at Rice's apartment in the Summer of 1979. The two men discussed a potential transaction for a quantity of pure heroin. After several later telephone conversations with Brantley and Rice, the terms of the transaction were set—⅛ kilogram of pure heroin to be sold to Agent Williams for 50 pounds of quinine and $70,000. The transaction was to be consummated on January 10 or 11, 1980.

On the morning of January 11, 1980, Agent Williams, accompanied by undercover agents Robert Baker and Lorraine Coleman arrived at the Rice apartment on West 123rd Street at approximatly 12:10 p.m. Upon their arrival, Agents Coleman and Williams entered Rice's apartment, where they met Rice, Brantley and Deborah Smith, a friend of Ms. Rice. After exiting the apartment to retrieve the quinine from Agent Baker, who remained in

the car, Agent Williams saw defendant Waters for the first time—standing on the curb near Ms. Smith's car.* As he retrieved the quinine, Agent Williams saw Waters enter the building.

Upon returning to the building, Agent Williams was met in the hallway by defendant Brantley, who directed him to place the quinine in the bathroom in the first floor hallway, outside Ms. Rice's apartment. The quinine was placed in the bathtub and after he exited the bathroom, Brantley placed a padlock on the bathroom door. After some further negotiations in the hallway and outside the building concerning the mechanics of exchanging the money for the drugs, Agents Williams and Coleman returned to the Rice apartment with the money in a shoulder bag.

Inside the Rice apartment on this occasion were Brantley, Rice and, for the first time, Waters. Upon Williams, Baker and Coleman entering the apartment, Waters was immediately asked to leave by Brantley and the two of them proceeded outside to the hallway where they were joined by Ms. Smith. At this juncture, with Waters outside in the hallway, Brantley and Rice began counting the money the agents had brought and they started to haggle over how the drug transfer was to be accomplished. Brantley took the money initially and was stopped by Agent Baker who wasn't about to let him leave the apartment with it. Eventually, it was agreed that Agent Coleman would go with Ms. Rice down to the street to pick up the package. Thereupon, Rice, accompanied by Agents Coleman and Baker left the apartment to retrieve the package while Agent Williams remained with Brantley.

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* During the entire period of the conspiracy (May 1979 to January 1980), the agents had never met defendant Waters and had no idea as to his identity when he was initially seen in front of Rice's apartment building that morning, in the company of Deborah Smith.

In the interim, while waiting for the trio to return, Agent Williams and Brantley went out into the hallway, where Williams observed that the bathroom door was ajar with someone obviously inside. They subsequently returned to the apartment to await their companions' return. Within about five minutes thereafter, the trio returned and upon a prearranged signal, the three agents arrested Rice and Brantley.

Thereupon, after securing their arrests, Agent Williams looked inside the bathroom and discovered Waters with his pants open and the commode down. The quinine was also observed to be in the bathtub where it had originally been placed (the blanket under which it originally had been placed was slightly ajar) and a brown paper bag was also observed on the floor several feet from Waters. The brown paper bag was subsequently found to contain heroin. Waters was immediately placed under arrest.

After arrest, Waters stated, in the course of debriefing, that while he was admittedly the owner of the PFP Garage, located at 275 St. Nicholas Avenue, and had the nickname "Sugar",* he had no knowledge or involvement in the narcotics transaction in the Rice apartment, having been present only by virtue of having accompanied his girlfriend, Debby Smith, who was there to visit Natalie Rice. Waters' statement was supported by defendant Brantley, who, in his post-arrest statement to an Assistant United States Attorney, stated, *inter alia,* that Waters had not been involved in any deals with him — exonerating Waters of any involvement in the morning's transaction.

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* Significantly, on cross-examination of the agents, it developed that there were other suspected narcotics dealers known to them in the neighborhood who had the nickname "Sugar" including one such individual (nicknamed "Brown Sugar") living in the Rice apartment building and with whom they had earlier had negotiations in an unrelated transaction.

REASONS FOR GRANTING THE WRIT

The Second Circuit's "fair preponderance" test for independent nonhearsay corroboration of defendant's conspiratorial involvement is an impermissibly less stringent standard than the "prima facie" test adopted by five other circuits.

In analyzing the miniscule quantum of proof of Petitioner's direct involvement in the activities of the other defendants—predicated primarily upon his fortuitous presence in a bathroom where the drugs happened to have been secreted—several additional factors require consideration in scrutinizing the significance *vel non* of his accidental presence in a place where a narcotics transaction was transpiring without any direct personal involvement on his part in the transaction.

The only evidence to tie him either to the conspiracy or the substantive offense was his brief presence in the Rice apartment as well as his later and thoroughly ambiguous proximity to the narcotics in the bathroom where he was found with his pants open and the commode down. No discussion of narcotics is alleged to have occurred in his presence and, indeed, he was asked to leave the Rice apartment shortly before a narcotics transaction was about to transpire. Thus, Petitioner's mere presence, without more, is hardly enough to link him to the conspiracy or transaction that occurred in the Rice apartment. See, e.g., *United States* v. *Di Re,* 332 U.S. 581, 593 (1947); *United States* v. *Cirillo,* 499 F.2d 872, 884 (2d Cir. 1974); *United States* v. *Terrell,* 474 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Fantuzzi,* 463 F.2d 683, 690 (2d Cir. 1972); *United States* v. *Steward,* 451 F.2d 1203, 1206 (2d Cir. 1971); *United States* v. *Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962).

Moreover, even when viewed in the light most favorable to the Government (*Glasser* v. *United States,* 315 U.S. 60 (1942)), the independent nonhearsay evidence corroborating Petitioner's involvement in the conspiracy proper (both direct and circumstantial) was exceedingly tenuous, at best. Shorn of the coconspirator declarations of defendants Brantley, Rice and Phillips as to the source of supply being "the man in the Garage" or "Sugar", the entirety of the independent nonhearsay evidence of Petitioner's involvement in the conspiracy consisted principally of Petitioner's ambiguous presence in Rice's apartment and the hallway bathroom on the morning of January 11, 1980.*

The District Court, however, found that under the Second Circuit's standard for measuring the necessary quantum of independent nonhearsay evidence of defendant's conspiratorial involvement prior to permitting the jury to consider coconspirator declarations against him (FRE Rule 801(d)(2)(E)), Petitioner's participation had been established by that "fair preponderance" of the independent nonhearsay evidence required in the Second Circuit. In so doing, the District Court followed the applicable standard delineated in *United States* v. *Geaney,* 417 F.2d 1116 (2d Cir. 1969):

> "[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay

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* As the Government agents testified, when they saw Petitioner outside Rice's apartment on the morning of January 11, they didn't even know who he was, having never seen him before over the seven month course of their undercover operation. Moreover, absent the statements of Rice, Brantley and Phillips, the agents had no other independent evidence as to "Sugar" or "the man in the Garage" that otherwise linked him to Petitioner other than his mere presence on the morning of January 11.

> utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility . . . declare a mistrial if the defendant asks for it."

Id., 417 F.2d at 1120.

It is respectfully submitted, however, that the *Geaney* standard, which has been considered and rejected in five other circuits, is ripe for appropriate consideration by this Court, particularly in light of the fact that this Court has yet to resolve the apparent conflict impliedly created between *Geaney* and this Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974) regarding the appropriate quantum of independent nonhearsay evidence of defendant's conspiratorial involvement which must be introduced as a preliminary matter before coconspirator declarations may be admitted against a defendant.

In *United States* v. *Oliva,* 497 F.2d 130 (5th Cir. 1974), the Fifth Circuit, expressly rejecting *Geaney,* defined the appropriate test as being, "whether the government, by evidence independent of the hearsay declarations of a coconspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence *aliunde* the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator." *Id.* at 132-133 & n. 3.

The *Oliva* test has been expressly adopted by the First, Eighth and Ninth Circuits. See, e.g., *United States* v. *Johnson,* 467 F.2d 804, 807 (1st Cir. 1972) (evidence "credible and sufficient to support the finding of concerted

action"); *Rizzo* v. *United States,* 304 F.2d 810, 826 (8th Cir. 1962) ("sufficient prima facie showing . . . *aliunde* of the declaration of an alleged co-conspirator"); *Carbo* v. *United States,* 314 F.2d 718, 737 (9th Cir. 1963) ("[T]he test is . . . whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made").*

Under the *Oliva* standard, then, coconspirator declarations may be placed before the jury if and only if there is a sufficient quantum of independent nonhearsay evidence pointing to defendant's conspiratorial involvement that would sustain the jury's finding of guilt wholly separate and apart from the coconspirator declarations sought to be placed before the jury. *Id.* 497 F.2d at 132-133.

The Second Circuit has expressly rejected this higher standard embraced by five other circuits, opting instead for a less stringent test that requires merely that there be a "fair preponderance" of independent nonhearsay evidence suggesting defendant's conspiratorial involvement. *United States* v. *Stanchich,* 550 F.2d 1294, 1299 (2d Cir. 1977); *United States* v. *Geaney,* 416 F.2d at 1120.

Indeed, substantial language in this Court's opinion in *United States* v. *Nixon, supra,* strongly suggests that *Oliva* rather than *Geaney* sets out the appropriate evidentiary standard in this area. As this Court noted in *Nixon,* "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury (citations omitted). Whether the standard has been satisfied is a question of admissibility

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* The Tenth Circuit applies a test which appears similar to the prima facie showing test. That court conditions the admissibility of co-conspirator hearsay upon "proof of circumstances from which the existence of the conspiracy fairly may be inferred . . ." *Bartlett* v. *United States,* 166 F.2d 920, 925 (10th Cir. 1948).

to be decided by the trial judge." *Id.* 418 U.S. at 701 & n.14.

The disparity created between *Geaney* and the *Oliva-Nixon* line of cases is substantial, particularly with regard to disposition of the instant case. In *Oliva,* on facts virtually identical with those of the case at bar, the Fifth Circuit found that the simple fact that telephone calls had been placed between defendant's and the narcotics seller's residences as well as defendant's mere presence in a parking lot at the time of an attempted sale was plainly insufficient independent nonhearsay corroboration of defendant's involvement in the conspiracy in the absence of proof that defendant and the seller had ever discussed the transaction or that defendant had ever actually supplied narcotics to the seller. On the basis of this paucity of independent nonhearsay proof, the Fifth Circuit reversed. *Id.* 497 F.2d at 134.

Similarly, in the case at bar, it is clear that the wholly ambiguous circumstances of Petitioner's mere presence at the Rice apartment—shorn of the coconspirator declarations relating to the "man in the Garage" and "Sugar"—was a plainly insufficient basis upon which to admit the mass of coconspirator statements of Rice, Brantley and Phillips.* Certainly, hearsay itself cannot be used to bootstrap itself into making the preliminary factual determination of whether there existed a sufficient independent nonhearsay basis for finding Petitioner's involvement in the instant conspiracy. *Cf. United States* v. *Cirillo, supra,* 499 F.2d at 885.

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* This case thus presents the classic fact pattern demonstrating nonhearsay evidence arguably sufficient under *Geaney* which is plainly insufficient under *Oliva* and *Nixon.*

Accordingly, certiorari should be granted to review this substantial and continuing disparity of standards among the circuits regarding admissibility of coconspirator declarations.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 27, 1980

Respectfully submitted,

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* Moreover, review by this Court would appear to be singularly appropriate in light of the fact that the Second Circuit has expressly considered the *Oliva* line of cases, and the disparity created between them and *Geaney*, and has explicitly rejected any modification of the *Geaney* rule. See, e.g., *United States* v. *Stanchich*, 550 F.2d 1294, 1299 & n. 4 (2d Cir. 1977) (Friendly, J.). Indeed, the Second Circuit has also refused reconsideration of *Geaney* in light of *United States* v. *Nixon*, *supra*, dismissing the higher evidentiary standard impliedly suggested by this Court as "pure dictum . . . gratuitously offered." *United States* v. *Wiley*, 519 F.2d 1348, 1351 & n. 5 (2d Cir. 1975).

APPENDIX

Order of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of October, one thousand nine hundred and eighty.

Present: HONORABLE IRVING R. KAUFMAN
HONORABLE AMALYA L. KEARSE
HONORABLE MYRON H. BRIGHT, sitting by designation,
Circuit Judges,

80-1304

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN WATERS, a/k/a "Sugar",

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The district court's holding that appellant was a member of the conspiracy alleged in the indictment rested on "reasonable grounds," *see United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). Accordingly, the statements of appellant's alleged coconspirators were properly admitted, *see United States* v. *Geaney, supra.*

2. Viewed in the light most favorable to the Government, *Glasser* v. *United States,* 315 U.S. 60 (1942); *United States* v. *Barnes,* 604 F.2d 121 (2d Cir. 1979), *cert. denied,* 100 S.Ct. 1833 (1980), the evidence is more than sufficient to sustain appellant's conviction. *See United States* v. *Barnes, supra,* 604 F.2d at 158; *United States* v. *DeNoia,* 451 F.2d 979 (2d Cir. 1971).

3. The mandate shall issue forthwith.

IRVING R. KAUFMAN
AMALYA L. KEARSE
MYRON H. BRIGHT,
Circuit Judges.